In the Supreme Court of the United States

OCTOBER TERM, 1945

No.....

COWELL PORTLAND CEMENT COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Brief in Support of Petition for Writ of Certiorari

I.

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals was rendered on March 6, 1945. The opinion is reported under the title of *National Labor Relations Board v. Cowell Porland Cement Co.* in 148 Fed.(2d) 237 and is set forth in full in the record (R. 3668-3700).

II.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

A full statement of these grounds has heretofore been given under headings B and D of the petition for the writ. In the interest of brevity, the statement will not be repeated in this brief.

III.

STATEMENT OF THE CASE

The Court is respectfully referred to the "Summary Statement of the Matter Involved" which appears under heading A of the petition for the writ.

The facts and the law on which we rely will be set forth under Points A, B, C and D of the Argument herein. A full statement of the case will appear in connection with each of said Points.

IV.

SPECIFICATION OF ERRORS

A. The United States Circuit Court of Appeals erred in holding that the Board had jurisdiction in a case in which the Board's findings affirmatively declared that the employer is not engaged *in commerce* (as defined in the Act) and in which there is neither finding nor evidence that the employer's acts burden or obstruct the commerce of anyone else.

In connection with the issue of jurisdiction, the Court also erred in holding that the jurisdiction of

the Board, an administrative tribunal, is to be determined on the facts which existed at the time it filed the complaint instead of at the time when it rendered its decision.

B. The United States Circuit Court of Appeals erred in holding that, in the case of an unfair labor practice by an employer, the Board may award back pay to a striking employee for the time during which he was on strike, even though there has been no request for reinstatement.

C. The United States Circuit Court of Appeals erred in holding that back pay may be awarded for the period of time during which the employees unreasonably delay the filing with the Board of a proper charge.

D. The United States Circuit Court of Appeals erred in holding that, in a case in which the employee has secured other regular and substantially equivalent employment, the Board may direct reinstatement, without any finding of fact showing that the effectuation of the policies of the Act requires such reinstatement.

V.

ARGUMENT

SUMMARY OF THE ARGUMENT

The argument will be presented under the four Points specified in Part IV of this brief, entitled "Specification of Errors".

Point A

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE BOARD HAD JURISDICTION IN A CASE IN WHICH THE BOARD'S FINDINGS AFFIRMATIVELY DECLARED THAT THE EMPLOYER IS NOT ENGAGED IN COMMERCE (AS DEFINED IN THE ACT) AND IN WHICH THERE IS NEITHER FINDING NOR EVIDENCE THAT THE EMPLOYER'S ACTS BURDEN OR OBSTRUCT THE COMMERCE OF ANYONE ELSE

1. The statutory provisions.

Section 2(6) of the National Labor Relations Act, 29 U.S.C.A., Sec. 152(6), provides:

> "The term 'commerce' means trade, traffic, commerce, transportation or communication among the several states, . . ."

In the interest of clarity and to avoid confusion with intrastate commerce, we shall, at times, refer to this commerce as interstate commerce.

Section 10(a) of the Act, 29 U.S.C.A., Sec. 160(a), provides, in part:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) *affecting commerce.*"*

Section 2(7) of the Act, 29 U.S.C.A., Sec. 152(7), reads:

> "The term 'affecting commerce' means *in* commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

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*Unless otherwise specified, all italics in this brief are ours.

There are thus two broad classes of cases in which the National Labor Relations Board has jurisdiction over an employer, namely

(a) Where the employer is engaged *in* interstate commerce; and

(b) Where the employer is not so engaged but his acts burden or obstruct the interstate commerce of *some one else's business.*

This situation appears very clearly from the concurring opinion of Justices Black, Douglas and Murphy in this Court's most recent decision on this subject. The case is *Polish National Alliance v. National Labor Relations Board,* 322 U.S. 643, decided on June 5, 1944.

At page 651:

"The Board did not exercise jurisdiction and enter its order on a fact finding that petitioner's insurance activities merely affected commerce *in types of interstate business other than its own.* On this fact issue it made *no finding at all.* Its finding was that the petitioner, being 'engaged in the insurance business', was 'engaged *in* commerce within the meaning of the Act'. This ultimate finding of fact rested on detailed subordinate findings which revealed the widespread interstate activities of the petitioner in carrying on its insurance business."

Again, on page 653:

"The Board not having found as a fact that petitioner's life insurance business affected interstate activities *of other businesses,* the first issue is whether the Board's findings that petitioner's insurance activities were conducted across state lines are supported by evidence."

The Court unanimously found that petitioner's activities were so conducted.

In other words, if the Board finds, on substantial evidence, that the employer is, at the time, engaged *in* interstate commerce, there is no need to look further: but if the employer is not so engaged *in* interstate commerce, the Board's jurisdiction will not be upheld except on findings of fact, substantially supported, that the employer's activities burden or obstruct *some other business* which *is* engaged *in* interstate commerce.

With that distinction in mind, we next consider what findings of fact the Board actually made and what the Court held in the present case, on the commerce issue.

Before addressing ourselves to these matters, we wish to point out that the Circuit Court of Appeals was in error in stating that it had been our assumption that to be subject to the Board's jurisdiction an employer must be engaged *in* commerce. Both in our brief and in oral argument we considered also the second alternative but we insisted that there are in this case neither evidence nor findings of fact justifying assumption of jurisdiction by the Board under either the first or the second alternative.

2. Board's findings of fact on commerce issue.

On pages 491 to 499 of the Record, the Board addresses itself to findings of fact on the issue whether or not respondent is engaged *in* interstate commerce. We shall hereinafter consider these findings in detail.

For the present, we wish to draw the Court's attention to the fact that the Board there states that thus far it

has been considering only whether respondent's operations are "interstate in character"; i.e., whether respondent is engaged *in* interstate commerce.

In its concluding paragraph on the subject of jurisdiction (R. 499), the Board is still thinking in terms of engaging *in* interstate commerce.

Neither here nor anywhere else in the decision are there any findings of fact on whether or not petitioner's activities burden or obstruct the commerce of *any other business*, whether competitive or not. The simple fact is that the Board did not ground its jurisdiction on any such contention.

As this Court said in *Polish National Alliance v. National Labor Relations Board*, supra, p. 651:

> "The Board did not exercise jurisdiction and enter its order on a fact finding that petitioner's insurance activities merely affected commerce in types of interstate business other than its own. On this fact issue it made *no finding at all.*"

That is exactly our case. And the Board not having found as a fact that petitioner's activities affect the interstate activities of other business, the Board's jurisdiction can be upheld only on adequate findings, supported by substantial evidence, that at the time as of which that issue must be determined, petitioner was engaged *in* interstate commerce.

3. Action by the Court.

The Court, on the other hand, bases its decision on the assumption "that respondent (petitioner herein) was not engaged *in* commerce after March 1, 1940" (148 Fed.

(2d) 237, 241; R. 3677), the complaint having been filed on May 11, 1940. The Court holds (148 Fed.(2d) 237, 242; R. 3678) that the case falls within the second of the above two classes of cases, *as to which the Board made no findings of fact and as to which there was no evidence.*

In view of these conflicting positions taken by the Board and the Court, it becomes necessary to refer to the findings and the evidence bearing on each of the above two classes of cases.

4. Petitioner is not engaged in interstate commerce.

a. Raw materials.

The evidence shows, without dispute, that the raw materials out of which Cowell cement is made—limerock, sand, clay, gypsum—is all taken from California soil and that none of it ever crosses the California state line.

b. Cement.

The Board has found as a fact that the last shipment of cement to any point out of California was made on January 9, 1940, on a sale made in 1939. A strike on the San Francisco waterfront prevented the movement of the cement until January 9, 1940. After that date, not a pound of Cowell cement has been shipped to any place outside of California nor has any sale been made to any purchaser located outside the State. After that date, not a pound of Cowell cement has crossed the California state line (R. 493).

c. Power, fuel oil, repair parts and supplies.

The motive power used to drive the machinery in the cement mill at Cowell is electric energy generated and transmitted within California (R. 1927-8).

Fuel oil is used in the kilns in great volume. It is also produced in California oilfields and processed in an oil refinery at Martinez, California (R. 1928).

That leaves nothing except certain repair parts and certain supplies for the operation of the cement mill at Cowell. The great bulk of these items has always been produced in California and secured from points in California, principally the San Francisco Bay area (R. 1942-3).

These repair or replacement parts and supplies move to Cowell on the line of a short local railroad known as the B. P. & C. After referring to certain movements on this line in January and February, 1940, the Board expressly found (R. 494):

> "The records of the B. P. & C. disclose no interstate shipments thereafter . . ."

The record shows that on and after March 1, 1940, there has been no shipment of any repair or replacement parts or supplies from any point outside of California to Cowell and that after that date all such items have been produced in California or purchased from local California stocks (R. 494).

The Court refers (148 Fed.(2d) 237, 242; R. 3677) to items totaling $21,214.13 of materials, equipment and supplies which were shipped during January and February, 1940. This total consists of the following items:

> (a) Items totaling $4,836.00, which were produced or manufactured out of California but had become part of the local stocks of California dealers and were thereafter shipped from those stocks for delivery to Cowell.

The Board expressly found as a fact that these items were so shipped from California stocks (R. 494; see also Board's Exhibit 113b, R. 3515, 3517) and further found that subsequent to February, 1940, there have been *no interstate shipments to Cowell* (R. 494).

(b) Items totaling $16,378.00, consisting of 7 shipments purchased in 1939.

However, the Board's own exhibits and evidence showed, and the Board found, that the last of these items were delivered at Cowell in February, 1940, and that, beginning with March 1, 1940, there have been "no interstate shipments" (the Board's own words) to Cowell (R. 494).

The record thus shows, from the Board's own findings of fact, that, beginning with March 1, 1940, there have been no interstate shipments, either inbound or outbound, moving either to or from the cement mill at Cowell.

Since that time, petitioner has not engaged *in* commerce (Sec. 2(6) and (7) of the Act).

The complaint was filed on May 11, 1940, after petitioner's waning transactions *in* interstate commerce had completely ceased.

5. Petitioner's activities do not burden or obstruct the commerce of any third party.

As we have already pointed out, the Board made no finding of fact on this subject. It is obvious, from a study of the Board's decision, that it placed no reliance on any such situation. The Board relied exclusively on transactions *in* interstate commerce, which completely ceased some time before the complaint was filed.

We turn now to the Court. After assuming, as it was required to do, that petitioner has not engaged *in* commerce after March 1, 1940, the Court bases its conclusion on the issue of jurisdiction on the fact that certain items of materials and supplies which had been shipped into California and which had become part of the local stocks of California dealers, were thereafter shipped to Cowell in intrastate commerce (148 Fed.(2d) 237, 242; R. 3677-8). The Court's thought seems to be that as these items moved in interstate commerce when they originally entered California, a labor dispute at Cowell might burden or obstruct the commerce of the parties who originally shipped the items into California. The Board had no such thought and made no such finding.

Apart from the remoteness of any such effect, we invite the Court's attention to the following considerations:

(a) "The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely 'affecting' such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to interstate commerce. In applying this doctrine to particular situations this Court properly has been cautious, and *has required clear findings* before subjecting local business to paramount federal legislation."

Polish National Alliance v. National Labor Relations Board, 322 U.S. 643, 652;

City of Yonkers v. United States, 320 U.S. 685.

As already pointed out, the Board made no such finding of fact.

(b) "Whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

Florida v. United States, 282 U.S. 194, 209;
City of Yonkers v. United States, 320 U.S. 685, 690;
Polish National Alliance v. National Labor Relations Board, 322 U.S. 643, 652-3.

(c) The National Labor Act does not vest courts with power to supply findings which the Board did not make.

Polish National Alliance v. National Labor Relations Board, 322 U.S. 643, 651;
City of Yonkers v. United States, 320 U.S. 685, 690;
Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80, 94.

We also submit that *National Labor Relations Board v. Fainblatt,* 306 U.S. 601, on which the Circuit Court of Appeals relies (148 Fed.(2d) 237, 241; R. 3676), is not, except in its affirmance of the de minimis rule, in point here, because its facts are entirely different. The difference will appear clearly from the following two citations:

At page 603:

"Throughout the year there is normally a continuous day-by-day flow of shipments of raw materials to respondent's factory from points without the state, and of finished garments from respondent's plant to New York City and other points outside of New Jersey."

At page 605:

"Here interstate commerce was involved in the transportation of materials to be processed across

state lines to the factory of respondents and in the transportation of the finished product to points outside the state for distribution to purchasers and ultimate consumers."

As we have pointed out, there is in the present case no transportation of "materials to be processed" across state lines to Cowell and no transportation of any finished product to any point outside the State of California.

In the present case, the Board, in the last analysis, seems to base its claim to jurisdiction on the shipment of repair parts and supplies which moved to Cowell *in* interstate commerce in January and February, 1940, which movement permanently ceased before the complaint was filed.

Accordingly, we shall now address ourselves to one final question on this issue, namely,

"As of what date is the Board's jurisdiction to be determined?"

6. Date as of which Board's jurisdiction is to be determined.

We are here concerned with the power and authority of a regulatory *administrative tribunal*, not of a *court*.

We submit that the jurisdiction of the Board in this case must be determined by the facts existing *at the time the Board made its order.*

A well-reasoned case squarely in point is *United Corporation v. Federal Trade Commission*, 110 Fed.(2d) 473, decided by the United States Circuit Court of Appeals, Fourth Circuit, on March 11, 1940, opinion by Judge Parker.

The Federal Trade Commission had filed a complaint against United Corporation at a time when the Commission clearly had jurisdiction over the corporation.

Thereafter, however, the corporation, *by its own voluntary act* in acquiring capital stock of two other corporations, called Montell, Inc. and Emmart Food Products Co., changes its status so that it became a "packer" within the language of the Packers and Stockyards Act which gave the Secretary of Agriculture the power to regulate the business of "packers".

The relevant dates are as follows:

September 26, 1914—Federal Trade Commission Act approved (15 U.S.C.A., p. 327).

August 15, 1921 —Packers and Stockyards Act approved (7 U.S.C.A., p. 89).

March 31, 1937 —Federal Trade Commission files its complaint.

April 12, 1937 —United Corporation, by its voluntary act, acquires 20% of capital stock of Montell, Inc. and thereby becomes a "packer" under the Packers and Stockyards Act, subject to regulation by the Secretary of Agriculture.

May 1, 1937 —United Corporation, by its voluntary act, acquires 20% of capital stock of Emmart Food Products Co., with similar effect.

August 2, 1939 —Decision of Federal Trade Commission requiring United Corporation to cease and desist from specified practices.

The Federal Trade Commission having had jurisdiction at the time when the acts complained of were committed, the question at issue was whether or not it retained its jurisdiction so as to authorize it to make the order directed against the "packer". Circuit Judge Parker stated the position taken by the Federal Trade Commission, as follows (p. 474):

"The Commission, while virtually conceding that petitioner at the time of the entry of its order came within the definition of a packer as contained in the Packers and Stockyards Act, contends that it had jurisdiction *because petitioner had not acquired that status at the time of the filing of the petition before it.*"

The Court held that this position was not well taken. It decided, in view of the fact that the Commission's power is *regulatory* or *remedial* and *not punitive,* that the issue of the Board's jurisdiction must be determined on the facts which existed *at the time when the Board made its decision* and *not as of the time when the acts were committed or when the administrative tribunal filed its complaint.* On this subject, the Court said (p. 475):

"And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurisdiction must exist at the time of the entry of its order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices or at the time of the filing of the complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future. The Commission cites a number of cases holding that the jurisdiction of a court attaches upon the filing of the complaint and that subsequent changes cannot confer or divest jurisdiction; but these cases, we think, have no bearing upon the question here involved and furnish no analogy to be applied in the case of a regulatory commission whose orders operate in futuro."

Continuing, the Court said (p. 476):

> "An analogy is furnished, however, by the rule prevailing in equity to the effect that the court, in making its decree, is governed by the situation existing at the time the decree is entered, and not by that which existed at the inception of the litigation. 10 R.C.L. 559; 21 C.J. 664; *Stonega Coke & Coal Co. v. Price,* 4 Cir., 106 F.2d 411, 419; *Randel v. Brown,* 2 How. 406, 11 L.Ed. 318. And relief will not be afforded in equity when during the pendency of the suit, even on appeal, an event occurs making it impossible to grant effective relief. *Tennessee v. Condon,* 189 U.S. 64, 23 S.Ct. 579, 47 L.Ed. 709; *Mills v. Green,* 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293."

In conclusion on this point, the Court said (p. 476):

> "When petitioner here, by acquiring stock in Montell, Inc., and Emmart Food Products Co., became a packer within the meaning of the Packers and Stockyards Act and subject to the jurisdiction of the Secretary of Agriculture, the Trade Commission had no further power of regulation over it; and the fact that the Commission may have been considering regulation under a complaint theretofore filed is immaterial."

The Court then referred to *Chamber of Commerce of Minneapolis v. Federal Trade Commission,* 13 Fed.(2d) 673, as "a case directly in point". Referring to that case, the Court said (p. 476):

> "A case directly in point is *Chamber of Commerce of Minneapolis v. Federal Trade Commission,* 8 Cir., 13 F.2d 673, 685. It appeared in that case that, while a proceeding against the Minneapolis Chamber of Commerce was pending before the Trade Commission,

Congress passed the Grain Futures Act, 7 U.S.C.A. §1 et seq., regulating a number of matters involved in the proceeding. In holding that as to these matters the Commission ceased to have jurisdiction, notwithstanding that the proceeding had been filed before the passage of the Grain Futures Act, the Court said: 'The above act was passed after this complaint was filed but before the order was made herein. *As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon.*' "

The Court then said (p. 476):

". . . *we are of opinion,* for the reasons stated, *that the jurisdiction of the Commission over petitioner must be judged as of the date of its order,* and that at that time it had no jurisdiction, since prior thereto petitioner had become a packer within the meaning of the Packers and Stockyards Act and its business had become subject to the exclusive regulation of the Secretary of Agriculture."

The Court concluded (p. 477):

"For the reasons stated, the order of the Federal Trade Commission will be set aside for lack of jurisdiction over the business of petitioner."

On the authority of the *Chamber of Commerce of Minneapolis* and the *United Corporation* cases and the cases cited by the Court in the decision in the *United Corporation* case, it is clear that the jurisdiction of the National Labor Relations Board must be decided on the facts as

they existed at the time the Board rendered its decision. In the absence of evidence to the contrary, it will, of course, be presumed that the facts on this issue shown to exist at the time of the trial continued to exist.

As petitioner had withdrawn from all interstate commerce, both outgoing and incoming, long before the Board made its decision, and as there is no finding of fact showing that petitioner's acts in any way burdened or obstructed the interstate commerce of anyone else, it is clear that the Board was without jurisdiction and that its decision is null and void.

The Circuit Court of Appeals referred to the above case as follows (148 Fed.(2d) 237, 241; R. 3677):

> "In support of its contention that the Board had no jurisdiction to issue the order on April 18, 1942, respondent cites *Chamber of Commerce v. Federal Trade Commission*, 8 Cir., 13 F.2d 673, and *United Corp. v. Federal Trade Commission*, 4 Cir., 110 F.2d 473. These cases did not arise under the National Labor Relations Act, but arose under the Federal Trade Commission Act, and hence are not in point."

As we read these two cases, they were decided on broad principles of administrative law and we find nothing therein indicating that it was intended to limit their effect to situations arising under the Federal Trade Commission Act.

However, if it be held that the determinative facts are those which existed at the time *when the Board filed its complaint*, namely, May 11, 1940, it appears, as we have shown, that the Board was likewise without jurisdiction to render the decision now before the Court.

We respectfully submit that the Board was without jurisdiction

(a) Because petitioner has at no time on or after March 1, 1940, been engaged *in* "commerce" (i.e., interstate commerce); and

(b) Because there was no evidence and no finding of fact by the Board that petitioner, not being so engaged, nevertheless by its acts burdens or obstructs the interstate commerce activities *of other businesses*, and the Act has not vested the Circuit Court of Appeals with power to supply findings of fact which the Board did not make.

Point B

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT, IN THE CASE OF AN UNFAIR LABOR PRACTICE, THE BOARD MAY AWARD BACK PAY TO A STRIKING EMPLOYEE FOR THE TIME DURING WHICH HE WAS ON STRIKE, EVEN THOUGH THERE HAS BEEN NO REQUEST FOR REINSTATEMENT

In this connection, the following facts are material:

1. The strike declared by the C.I.O. Union on July 17, 1937, has never been revoked and is still in effect.

The record so shows (R. 1020, 1042) and the fact is conceded.

2. The C.I.O. Union has never made request for reinstatement of its members.

This fact is likewise conceded. The Board made no finding of fact on the subject. The evidence required that if a finding had been made, it would have been to the effect that Local 356 has never made request for reinstatement of any of its members.

3. Every individual member of the C.I.O. Union who has ever made request for reinstatement has been reemployed.

> The record shows this fact without any contradiction (R. 2481, 2482, 2484-6).

On the basis of these facts, we rely on the well-established rule that, even though a strike is caused by unfair labor practice of the employer, back pay will not be awarded to a striker for the period of his strike up to the time when he requests reinstatement.

The underlying principle is that even though the strike has been caused by an unfair labor practice of the employer, such as the discriminatory discharge of employees, *a striking employee cannot, at one and the same time, both strike and receive back pay for the period of the strike.*

Excuses on his part for not having requested reinstatement do not change that fundamental situation.

Conceding the *facts* hereinbefore set forth, as the Court was bound by the record to do, the Court, nevertheless, ruled against petitioner's contention on this issue.

The Court said (148 Fed.(2d) 237, 245; R. 3686):

> "Respondent objects to paragraphs 2(a), 2(b) and 2(c). One objection is that some of the employees mentioned in these paragraphs participated in a strike called by Local 356 on July 17, 1937—after respondent had discriminatorily discharged them. This is not a valid objection."

We are not conscious of ever having made that objection. Our point has been and is that in the case of a strike, even though caused by an unfair labor practice of

the employer, *back pay* will not be awarded to a striker for the period of the strike and until he requests reinstatement.

The Court then said (148 Fed.(2d) 237, 245; R. 3686):

> "Another objection is that some of the employees mentioned in these paragraphs—employees whom respondent discriminatorily discharged—have not applied for reinstatement. This is not a valid objection."

In support of this statement, the Court cites, in a footnote—

> *National Labor Relations Board v. Sunshine Mining Co.*, 110 Fed.(2d) 780, 792; and
> *Idaho Potato Growers v. National Labor Relations Board*, 144 Fed.(2d) 295, 305.

We respectfully submit that these cases do not support the Court's conclusion.

Referring first to the *Sunshine Mining Co.* case, the portion of the decision on which the Court relies reads as follows (p. 792):

> "As the actual effect of respondent's conduct was to discharge those employees, the circumstances dispensed with the necessity of application for *reinstatement.*"

However, this language refers to a striker's "application for *reinstatement*", i.e., *to get his job back*, which is quite different from an award of *back pay*—a matter to which the cited passage makes no reference.

In the *Idaho Potato Growers* case, *there was no strike at all*, so that the case would not seem to have any application to our present problem.

In a number of other cases before the Board, *employees took the stand and testified* that they did not apply for reinstatement for the reason that they understood that their application would be granted only on condition that they submit to some unfair labor practice. *In the present case, not a single employee so testified.* The record does not contain the name of a single striker who, for that reason, failed to apply for reinstatement.

The Board, in other cases, has itself applied the principle on which we rely.

In the case of *In re Hemp & Company,* 9 N.L.R.B. 449, the Board said (p. 462):

> "We have refused to award back pay to employees who voluntarily go on strike, even if in protest against unfair labor practices. The reasons for that policy impel us to suspend the accrual of back pay in this case from the date of the hearing to the date of application for reinstatement as to all the union men except the three who rejected an offer to return to work prior to the hearing."

To the same effect, see also *In re Prettyman,* 12 N.L.R.B. 640, 672.

We now invite the Court's attention to decisions of Circuit Courts of Appeals approving and applying the rule.

In *National Labor Relations Board v. American Manufacturing Co.,* 2 Cir., 106 Fed.(2d) 61, decided on July 26, 1939, employees went on strike on or shortly after June 30, 1937, because of an unfair labor practice of the employer (p. 68). On July 27, 1937, these strikers requested reinstatement. The Board, following the usual rule, awarded back pay only to the day (July 27, 1937) on

which the strikers asked for reinstatement. The Court, in approving the order, said (p. 68):

> "Accordingly, the Board might in its discretion require these men to be reinstated with back pay *from July 27, 1937*, and its order is to that effect."

This decision was affirmed by this Court in a Memo Opinion (309 U.S. 629), with one modification not here relevant.

In *United Biscuit Co. v. National Labor Relations Board*, 7 Cir., 128 Fed.(2d) 771, decided on June 17, 1942, it appeared that production, maintenance and repair workers belonging to two unions referred to as Local 431 and Local 1053, went on strike on September 26, 1940, because of "petitioner's unfair labor practices" (pp. 773, 776). The Board, applying the usual rule, fixed October 23, 1940, as the date of application by the strikers for re-employment and awarded back pay to that date only (p. 776).

The Court, on a review of the evidence, found that application for reinstatement was not made until November 20, 1940 (p. 778). Hence, the Court, applying the rule for which we contend, said (p. 778):

> "Furthermore, the Board's order which requires back pay from October 23, 1940, for the production workers (members of Local 431) and the maintenance and repair workmen (members of Local 1053) must be modified so as to provide back pay only from November 20, 1940."

In *Polish National Alliance v. National Labor Relations Board*, 7 Cir., 136 Fed.(2d) 175, decided on June 5, 1943, it appeared that members of the Union "went on strike

on October 7, 1941, as a result of petitioner's (employer's) refusal to bargain with the Union and other unfair labor practices" (p. 181). The strike lasted until January 27, 1942, on which day application for reinstatement was made. The Board ordered back pay back only to January 27, 1942. The Court held this order to be "proper" and in this connection said (p. 181):

> "We think that the Board's order requiring that such employees be made whole *from the date of their application for reinstatement* is proper."

The Court then considered the case of an employee named Ziolkowski, who had applied for reinstatement as early as October 10, 1941. The employer offered to reinstate him, provided that he file "as a new applicant for work", an unlawful condition because he would then lose his seniority rights. Two out of three members of the Board awarded back pay only to January 27, 1942, but the Court found, as a fact, that the application for reinstatement was made as early as October 10, 1941. Applying the usual rule, the Court held that Ziolkowski was entitled to back pay back to October 10, 1941, being the date on which he made application for reinstatement (p. 181).

This decision, with modifications not material on this issue, was affirmed by this Court in *Polish National Alliance v. National Labor Relations Board,* 322 U.S. 643, decided on June 5, 1944.

This Court's understanding of the rule appears in *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U.S. 177, 198, footnote 7, as follows:

> "Even though a strike is caused by an unfair labor practice the Board does not award back pay during

the period of the strike. (*Matter of Sunshine Hosiery Mills,* 1 N.L.R.B. 664."

As the strike declared by the C.I.O. Union on July 17, 1937, has never been revoked and is still in effect, and as the Union has never made request for reinstatement of its members, and as every individual member of the Union who has ever made request for reinstatement has been reemployed, we respectfully submit that the Board's back pay order should be denied enforcement.

Point C

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT BACK PAY MAY BE AWARDED FOR THE PERIOD OF TIME DURING WHICH THE EMPLOYEES UNREASONABLY DELAY THE FILING WITH THE BOARD OF A PROPER CHARGE

May 8, 1940, was the day on which the C.I.O. Union finally filed charges meeting the requirements of the Act. Prior to that time, the Union had filed charges and amended charges on which the Board had issued a complaint, but, as the Court pointed out in *National Labor Relations Board v. Cowell Portland Cement Company,* 108 Fed.(2d) 198, these documents and the complaint based thereon were fatally defective because they did not allege the existence of the A. F. of L. Union or its contract with petitioner herein.

It was not until May 8, 1940, that the C.I.O. Union finally filed charges containing the necessary allegations. As is well known, the Board's complaints are based on charges filed by complaining employees and until proper charges are filed a proper complaint does not issue.

The long delays prior to May 8, 1940, are the responsibility of the C.I.O. Union. For that reason, back pay should not, in any event, run back further than May 8, 1940.

In ruling on this issue, the Court said (148 Fed.(2d) 237, 246; R. 3690):

> "Respondent complains of delays in this proceeding and suggests that, if paragraph 2(b) is not set aside, we should, because of these delays, modify it 'so as to require back pay only for the period subsequent to May 8, 1940,' the date on which Local 356 filed its second amended charge. There have been delays, unfortunately, but we do not think they warrant the suggested modification."

As authority for this conclusion, the Court cites the following three cases:

National Labor Relations Board v. Electric Vacuum Cleaner Co., 315 U.S. 685, 698;

National Labor Relations Board v. Grower-Shipper Vegetable Association, 122 Fed.(2d) 368;

National Labor Relations Board v. J. G. Boswell Co., 136 Fed.(2d) 585.

In each of those cases, the Court declined to "visit the sins of the *Board* upon the employees", that is, declined to reduce the back pay which the employees would otherwise receive, because of the *Board's* delays. In none of those cases was there any showing of delay on the part of the *employees.*

The present case falls within the following principle recognized by this Court in *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, 199, footnote:

"If there is *unjustified delay in filing charges* before the Board, a deduction is made for the period of the delay."

We recommend to the Court's consideration the case of *National Labor Relations Board v. Mall Tool Co.*, 7th Cir., 119 Fed.(2d) 700. In that case, the employer urged that the Board's order as to back pay was unfair because it directed the employer to pay back wages back to March 15, 1937, the date of the lockout, whereas the charges were not filed until September 23, 1938, and the amended charge on April 28, 1939. Addressing itself to that contention, the Court said (p. 702):

"Respondent directs our attention to the fact that the Board itself has quite generally ruled that it will order back pay only from time of the filing of the charges, if there is unreasonable delay in filing charges and no mitigating circumstances are shown . . . We find in the record no mitigating circumstances justifying the delay."

Continuing, the Court said:

"It is obvious that undue delay in filing charges may not only prejudice the employer but also tend to encourage employees to await in idleness with the expectation that no matter how long they delay filing charges, they will receive compensation for all time during which they have been quiescent. The legislation contemplates that a proceeding such as this shall promote the public welfare; not that it shall benefit private parties in respects unrelated to that welfare."

Accordingly, the Court modified the Board's order so as to require back pay back only to the filing of the charges on September 23, 1938 (pp. 702, 704).

In the present case, the employees procrastinated for several years before filing proper charges. It seems to us that it would be clearly unjust to require the employer to pay back wages for this period and that to require him to do so would be giving to the Act a punitive rather than a regulatory effect.

We submit that if back pay is to be awarded at all, it should not be for any period of time prior to May 8, 1940.

Point D

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT, IN A CASE IN WHICH THE EMPLOYEE HAS SECURED OTHER REGULAR AND SUBSTANTIALLY EQUIVALENT EMPLOYMENT, THE BOARD MAY DIRECT REINSTATEMENT, WITHOUT ANY FINDING OF FACT SHOWING THAT THE EFFECTUATION OF THE POLICIES OF THE ACT REQUIRE SUCH REINSTATEMENT

Referring to this matter, the Court merely said (148 Fed.(2d) 237, 246; R. 3689):

> "The Board states its *conclusion* that the affirmative action required by the order—including that required by paragraphs 2(a), 2(b) and 2(c)—would effectuate the policies of the Act, and it found facts which, in our opinion, warrant the conclusion."

The Court did not state what those facts were, nor did it refer to any part of the Record or to any decision in support of its conclusion.

Turning to the Board's decision (R. 507), we find that the only support given by the Board to its above conclusion is a footnote (No. 79) referring to *Matter of Ford Company,* 31 N.L.R.B. No.170, and *National Labor Relations Board v. Continental Oil Company,* 121 Fed.(2d) 120.

The latter case does not even refer to the point here at issue. As to the *Ford* case, the *facts* in that case are, of course, not the *facts* in the present case, and *findings of fact* in the *Ford* case cannot be used as a substitute for the necessary *findings of fact* in the present case. Findings of fact cannot be tossed around from case to case in any such way.

It is the duty of the Board to make adequate findings of fact in order to give proper support to a conclusion that the policies of the Act require that, in a given case, the employer should offer *reinstatement* to his former employees who have secured other regular and substantially equivalent employment.

In *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U.S. 177, this Court held that this remedy does not automatically flow from the Act itself (p. 193) and that it is not mechanically compelled by the Act (p. 198). Before the Board may make such an order, it must make adequate *findings of fact* that such order will effectuate the policies of the Act (p. 196): and because the Board had not made such findings, this Court directed the Circuit Court of Appeals to remand the case to the Board for determination of this issue (p. 200).

The Board had found that "the effectuation of the policies of the Act patently requires" the restoration of the strikers to their status quo, and also that the employer should take affirmative action "designed to effectuate the policies of the Act" (p. 203) and had ordered the respondent to take affirmative action (including reinstatement) "which the Board finds will effectuate the policies of the act" (p. 204).

However, the Court, in the majority decision, held that these findings (or conclusions) were not sufficient and ordered the case remanded.

In the present case, the Board stated that it would require reinstatement and that the same would "effectuate the policies of the Act" (R. 507) and ordered the employer to take affirmative action (including reinstatement) "which the Board finds will effectuate the policies of the Act" (R. 517).

We invite the Court's especial attention to the fact that *the Board in the present case used exactly the same language—and no more—which this Court in the Phelps Dodge Corporation case found to be inadequate and insufficient.*

Furthermore, the Board in the present case made its conclusion *without any evidence* on the subject, all such evidence having been expressly deferred by reason of a stipulation (R. 1891-2).

We respectfully submit, in reliance on the decision of this Court in the *Phelps Dodge Corporation* case, supra, and on the state of the present record, that the Board's order as to reinstatement should be denied enforcement as to all former employees who have secured other regular and substantially equivalent employment.

It is respectfully submitted that the writ should issue.

Dated: San Francisco, California, July 11th, 1945.

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